OTHMAN HAMZAH

v.

DISCIPLINARY BOARD, JPJ, MALAYSIA & OTHER CASES

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[ORIGINATING SUMMONS NO: 24-175-2000]
17 FEBRUARY 2003

ADMINISTRATIVE LAW: *Public servants - Dismissal of public officers - Whether entitled to reinstatement - Whether there was procedural impropriety - Whether plaintiffs afforded reasonable opportunity to be heard - Whether first, second and third plaintiffs had rebutted charge in first show cause letter successfully - Public Officers (Conduct and Discipline) Regulations 1993, regs. 4(c), (d), (g), 28(1) - Federal Constitution, arts. 132, 135(2)*

PUBLIC SERVANTS: *Dismissal - Principles determining dismissal of public servant - Reasonable opportunity to be heard - Whether oral hearing necessary - Whether fair opportunity to be heard given - Federal Constitution, art. 135(2)*

These were four separate applications, but heard together, by four different plaintiffs, seeking reinstatement after allegedly being unlawfully dismissed by the defendants. The four plaintiffs (hereinafter referred to as P1, P2, P3 and P4 respectively), who were assistant enforcement officers of the Road Transport Department and therefore members of the services mentioned in cl. 1 of art. 132 of the Federal Constitution ('FC'), were dismissed from service for a similar misconduct, *ie*, allegedly receiving bribes. In the case of P1, P2 and P4, the dismissal procedure was entirely identical. A show cause letter was issued, but then withdrawn by the first defendant after P1, P2 and P4 had submitted their written representation denying the alleged misconduct. However, on the day that the first show cause letter was withdrawn, a second show cause letter was issued to P1, P2 and P4, with amended charges of misconduct. In the case of the P3, there was only one show cause letter charging him with misconduct.

The plaintiffs submitted that there was a failure in procedure due to the absence of a personal hearing and the failure to furnish the plaintiffs with copies of the statements or reports of the witnesses. Hence, whatever opportunity afforded

to the plaintiffs did not amount to a reasonable opportunity of being heard as enshrined in art. 135(2) of the FC. The plaintiffs further alleged that since P1, P2 and P4 had rebutted the charge as the first show cause letter was withdrawn after their written representation, and the charge in the first show cause letter was more or less identical to the charge in the second show cause letter, the first defendant could not re-launch the second charge. The defendants, however, averred that reg. 28(1) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations') only provided that a statement containing the facts shall be sent to the officer, and that the relevant facts in the present case were contained in the show cause letters. They further submitted that by virtue of the Federal Court case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Bedi Perumal*, art. 135(2) of the FC did not require a disciplinary authority to afford a public officer an oral hearing.

Held:

[1] On the facts, there was no failure in procedure. It was required that the plaintiffs be sent a statement containing the facts of the breach of discipline alleged to have been committed by the plaintiffs, and that statement was given in the charge, in the respective show cause letters. It was further required that the plaintiffs be sent a statement containing the proposed ground on which the plaintiffs were to be dismissed or reduced in rank, and that statement was given in the same show cause letters which not only stated the proposed ground on which the plaintiffs were to be dismissed or reduced in rank, but also reproduced the provisions of reg. 4(c), (d) or (g) of the 1993 Regulations. It was finally required that the plaintiffs be sent a statement calling upon the plaintiffs to make written representations containing grounds upon which they relied to exculpate themselves, and that was also stated in the same show cause letters.
(p 26 e-f)

[2] To accept the contention that since the first show cause letter was withdrawn after representation meant that the charge in the first show cause letter had been rebutted would be to erase stubborn facts. The second show cause letter was issued at about the same time that the first show cause letter was withdrawn, and reasonably, when given that the charges in the first and second show cause letters were almost identical, the second show cause letter could not have been issued if the disciplinary authority was

satisfied that P1, P2 and P4 had exculpated themselves with regard to the charge in the first show cause letter. It was obvious that the withdrawal of the first show cause letter and the probably simultaneous issuance of the second show cause letter was the device that was employed to amend the charge. (pp 26 g-h & 27 a)

[Applications dismissed.]

Case(s) referred to:

AG Singapore v. Ling How Doong [1969] 1 MLJ 154 ***(refd)***

Ang Seng Wan v. Suruhanjaya Polis Di Raja Malaysia & Anor [2002] 1 CLJ 493 CA ***(refd)***

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 28 MLJ 169 ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi Perumal [2001] 2 CLJ 525 FC ***(foll)***

Legislation referred to:

Federal Constitution, arts. 132, 135(2)

General Orders (Conduct and Discipline) (Chapter D) Regulations 1969, GO 30(2)

Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, GO 26(2), (5)

Public Officers (Conduct and Discipline) Regulations 1993, regs. 4(c), (d), (g), 28(1), (2), (3), (4), (7)

Public Services Disciplinary Board Regulations 1993, reg. 14

For the plaintiffs - Tan Kok Kwang; M/s Tan Kok Kwang & Co

For the defendants - Mahamad Naser Disa (Nizam Zakaria); AG's Chambers

Reported by Suresh Nathan

JUDGMENT

Jeffrey Tan J:

These are four separate applications, but heard together, by four different plaintiffs, for the following identical orders:

a) Satu deklarasi bahawa pemecatan plaintif melalui surat bertarikh 15.6.1998 daripada Lembaga Tatatertib defendan-defendan adalah tidak sah, terbatal dan tidak mempunyai apa-apa kesan di sisi undang-undang;

b) Satu perintah injunksi mandatory bahawa defendan-defendan hendaklah mengambil semula plaintif untuk berkhidmat untuk defendan-defendan dengan tanpa kehilangan senioriti, gaji tunggakan dan lain-lain faedah yang diberikan oleh defendan-defendan mengikut undang-undang;

c) Bahawa defendan-defendan hendaklah membayar plaintif gaji tunggakan sejak 1.7.1998 berserta dengan segala bonus, elaun, kenaikan gaji tunggakan dan lain-lain faedah yang patut diberikan oleh Defendan-defendan kepada Plaintif mengikut undang-undang;

d) Bunga atas gaji tunggakan, bonus, elaun, kenaikan gaji tunggakan dan lain-lain faedah yang diberikan di bawah undang-undang;

e) Kos; dan

f) Lain-lain perintah atau relief selanjutnya seperti mana yang difikirkan suaimanfaat dan sesuai oleh Mahkamah Yang Mulia ini.

It is agreed that all four plaintiffs (hereinafter referred to as P1, P2, P3 and P4 respectively), who were assistant enforcement officers of the Road Transport Department and therefore members of the services mentioned in cl. 1 of art. 132 of the Federal Constitution, were dismissed from service for a similar misconduct. In the case of P1, P2 and P4, the dismissal procedure or process was entirely identical. A show cause letter (dated 16 July 1997, 12 June 1997 and 16 Juy 1997 respectively) was issued, but was then withdrawn by the 1st defendant on 24 December 1997, after P1, P2 and P4 had submitted their written representation denying the alleged misconduct. But on the day that the 1st show cause letter was withdrawn, a 2nd show cause letter, all dated 24 December 1997, was issued to PI, P2 and P4, separately charging PI, P2 and P4 with the following misconduct:

Against PI

Bahawa tuan, Encik Othman bin Hamzah K/P: 5059770, Pembantu Penguatkuasa N9, Jabatan Pengangkutan Jalan Negeri Melaka semasa bertugas di Jabatan Pengangkutan Jalan Muar, Johor secara rasuah menerima wang sebanyak RM2,200 pada 28.1.1995 dan wang sebanyak RM1,500 pada 28.2.1995 yang dikreditkan ke dalam akaun milik adik tuan Mohd Rafi bin Hamzah melalui akaun No 553581620 BSN Cawangan Jalan Rogayah, Batu Pahat oleh orang tengah Sekolah Memandu Asmuni, Zaidi & Zainuddin sebagai balasan meluluskan ujian calon-calon yang menjalani ujian memandu.

Against P2

Bahawa tuan pada 18.9.1995 telah secara rasuah menerima wang sebanyak RM450.00 dengan cara di dikreditkan melalui BSN Cawangan Segamat di dalam akaun No. 55732565-8, milik isteri tuan Fadilan bt Dares oleh orang tengah Encik Joss a/I K.C. Cheryan dan sehingga 22.9.1995 sejumlah RM16,930.00 wang rasuah telah dikreditkan ke dalam akaun yang sama sebagai balasan meluluskan calon-calon ujian memandu di Segamat, Tangkak, Bukit Gambir, Muar dan Batu Panat.

Against P4

> Bahawa tuan, Encik Azahar bin Mohd. Hussin, K/P: A 0882684, Pembantu Penguatkuasa Gred N9, Jabatan Pengangkutan Jalan Negeri Johor telah menerima wang rasuah pada 28.1.1995 sebanyak RM500.00 dan pada 28.2.1995 sebanyak RM700.00 dengan cara dikreditkan ke dalam akaun No: 555026566 milik ibu mertua tuan, Kamariah bt. Omar di BSN Cawangan Jalan Rogayah, Batu Pahat melalui orang tengah Sekolah Memandu ASMUNI".

In the case of P3, there was only one show cause letter, dated 24 December 1997, charging him with the following misconduct:

> Bahawa tuan pada 28.1.1995 telah secara rasuah menerima wang sebanyak RM5,000.00 dengan cara dikreditkan melalui BSN Cawangan Jalan Rogayah Batu Pahat di dalam akaun No. 570541005 milik adik perempuan Rozina Bt Awang oleh orang tengah Sekolah Memandu Asmuni sebagai balasan meluluskan calon-calon ujian memandu di Batu Pahat.

It is also agreed, that all four plaintiffs made representations answering the aforesaid charges, but that all plaintiffs were informed by letters dated 17 April 1998 that on ie, 31 March 1998 the Lembaga Tatatertib Kumpulan Sokongan (No. 1) had considered their respective representations and had found them each guilty of the respective charges. The same said letter dated 17 April 1998 also informed the plaintiffs that they could mitigate (merayu) on the punishment. All four plaintiffs mitigated for a lenient punishment, but the plaintiffs were informed by letter dated 15 June 1998, that on 11 June 1998 the Lembaga Tatatertib had considered the respective charges/replies and had imposed upon all plaintiffs the punishment of dismissal with effect from 1 July 1998. The same said letter dated 15 June 1998 also informed the plaintiffs that they, pursuant to reg. 14 of the Public Services Disciplinary Board Regulations 1993 [P.U. (A) 396/93], could appeal to the Disciplinary Appeal Board against the decision of the Disciplinary Board. All four plaintiffs appealed to the Disciplinary Appeal Board. And on 9 Novenber 1998, all four appeals were turned down by the Disciplinary Appeal Board, whose decision was conveyed to the plaintiffs by letters dated 18 November 1998, which all similarly informed as follows:

> Lembaga Rayuan Tatatertib Perhidmatan Awam dalam mesyuaratnya yang ke-837 pada 9.11.1998 setelah menimbangkan dengan teliti rayuan tuan itu, telah memutuskan bahawa hujah-hujah yang dikemukakan bagi menyokong rayuan tuan itu tidak dapat diterima sebagai boleh mengubah keputusan Lembaga Tatatertib yang telah menjatuhkan hukuman buang kerja ke atas tuan. Dengan hal yang demikian, Lembaga Rayuan mengambil keputusan menolak rayuan tuan.

It is also an agreed fact "bahawa Lembaga Tatatertib tidak membekalkan salinan penyataan saksi atau apa-apa repot kepada plaintif sebelum membuat keputusan untuk membuang kerja".

The agreed issues are as follows:

(a) Whether the plaintiffs had been given a reasonable opportunity of being heard in accordance with art. 135(2) of the Federal Constitution;

(b) Whether the proceedings which resulted in the dismissal of the plaintiffs were conducted in accordance with the rules of natural justice as enshrined in art. 135(2) of the Federal Constitution; and,

(c) Whether the charges against P1, P2 and P4 had been successfully rebutted in the earlier disciplinary proceedings.

Mr Tan Kok Kwang who appeared for all four plaintiffs began his submission by saying that the truth of the allegations against the plaintiffs is not in issue. "It is the procedure that is in question." "Although the plaintiffs were given an opportunity of being heard, they were not given a personal hearing." Then referring to *Ang Seng Wan v. Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 1 CLJ 493 and *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 28 MLJ 169, learned counsel submitted that the absence of a personal hearing and the failure to furnish the plaintiffs with copies of the statements or reports of the witnesses was a failure in procedure. "Whatever opportunity afforded did not amount to a reasonable opportunity of being heard as enshrined in art. 135(2)." Then turning to the 3rd agreed issue applicable only to P1, P2 and P4, learned counsel contended that P1, P2 and P4 had rebutted the charge as the 1st show cause letter was withdrawn after their written representation, that the charge in the 1st show cause letter was more or less identical to the charge in the 2nd show cause letter, and that the 1st defendant could not "relaunch the 2nd charge".

Learned Federal Counsel, Mr Mahamad Naser bin Disa (Miss Nizam bte Zakaria with him), however submitted that reg. 28(1) of the Public Officers (Conduct and Discipline) Regulations 1993 only provides that a statement containing the facts shall be sent to the officer, and that the relevant facts in the present cases were contained in the show cause letters. Then referring to the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi Perumal* [2001] 2 CLJ 525, the learned Federal Counsel further submitted that the Federal Court had recently approved the procedure as in the present cases. "There were sufficient facts in the show cause

letters for the plaintiffs to rebut the allegations. The Federal Court clearly held that art. 135(2) does not give a right of an oral hearing".

And indeed it was categorically held by the Federal Court in *Utra Badi*, that art. 135(2) of the Federal Constitution does not require a disciplinary authority to afford the public officer an oral hearing. The Federal Court also dropped a timely reminder that it is "necessary for each lower tier to accept loyally the decision of the higher tiers ... ". So it should not be argued that the absence of a personal hearing was a failure in the procedure.

It is less clear however that it could not be argued that the public officer should be furnished with the statements of witnesses. After all in *Ang Seng Wan*, the Court of Appeal clearly implied that in certain circumstance it might be necessary to furnish the statements of witnesses and reports to the public officer. In *Ang Seng Wan*, it was held that "there is nothing in law which prohibits a disciplinary authority from holding an oral hearing or enquiry", and that the "decision to hold an enquiry or not would depend on the circumstances of each case". In the event, it was held by the Court of Appeal that the absence of evidence to rebut or contradict the exculpatory statement of the public officer plus the fact that "the statements of witnesses and reports, although they were supplied to members of the PSC, were not supplied to ASP Gan" made it necessary for an oral hearing to be held, and that therefore the failure to conduct an oral hearing was a failure in the procedure and a breach of "natural justice as enshrined under art. 135(2)". Of course, this court is in no position to agree or disagree with the reasoning of the Court of Appeal. Suffice to say that the disciplinary authority in *Ang Seng Wan* was clearly faulted for the failure to conduct an oral hearing. But it had been held by the Federal Court in *Utra Badi*, that it could not be argued that the failure to give the public officer an oral hearing was a denial of justice. And since it could not be argued that the failure to give an oral hearing was a denial of justice, then there should not be a consideration of such factors, even if any, as would justify an oral hearing. What would be the point anyway if the failure to give an oral hearing is not a denial of justice? In any event, an examination of *Ang Seng Wan* reveals that the Court of Appeal had not held that statements of witnesses and reports must always be furnished to the public officer. The failure to supply the statements of witnesses and reports was merely one of the factors that persuaded the Court of Appeal in Ang Seng Wan to hold that there should be an oral hearing. It would not be valid to say that the Court of Appeal had held that failure to furnish statements of witnesses and report to the public officer is a

failure in procedure. Indeed, Regulation 28(1) of the current 1993 Regulations provides no more than that the disciplinary authority "shall direct that a statement containing the facts of the breach of discipline alleged to have been committed by the officer and any proposed ground on which the officer is to be dismissed or reduced in rank be sent to the officer and shall call upon him to make a written representation, containing grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days from the date of receipt of the charge". Regulation 28(1) does not say that the statements of witnesses and reports must be furnished to the public officer. In point of fact, under both the former General Order 26(2) of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 (replaced by the 1993 Regulations) and the former General Order 30(2) of the General Orders (Conduct and Discipline) (Chapter D) Regulations 1969, the disciplinary authority was not even required to furnish any statement containing the facts of the breach of discipline. Under both former general orders, the disciplinary authority was only required to "cause to be sent to the officer a statement ... of the grounds on which it is proposed to dismiss the officer or reduce him in rank ...". So far as a public officer is concerned, reg. 28(2) is definitely an improvement on the former position. But it is not any provision providing that statements of witnesses must be sent to the public officer. The clear guidance of the Federal Court in *Utra Badi* is that General Orders have legislative effect and that courts must therefore be guarded against adding words which were never intended. Regulation 28(2) only requires the officer to be sent a statement containing the facts of the breach of discipline alleged to have been committed. Then it should not be said, in the absence of words to such effect, that the Regulations require the statements of witnesses to be furnished to the officer.

Perhaps it could be argued that there is support in *B Surinder Singh Kanda* for the argument that the public officer must know the evidence against him (see judgment of Lord Denning at p. 172, where his Lordship held that "if the right to be heard is to be a real right which is worth anything, it must carry with it a right to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them"). According to the Privy Council, the adjudicating officer should "read (the statements of the witnesses) in the presence of (Inspector Kanda)". But the Privy Council "did not think that it was correct to let (the adjudicating officer) have the report of the Board of Enquiry unless (Inspector Kanda) had it so as to be able to correct or contradict the statements in it to his prejudice".

But *B Surinder Singh Kanda* was a case that would now fall under reg. 28(4). Under reg. 28(4) read together with reg. 28(7), if witnesses are called and examined by the Committee of Investigation appointed under sub-reg. 28(4), the public officer "shall be given the opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto". Hence, the right to be heard as expressed so forcefully by Lord Denning has already codified. But the present cases could not have been under reg. 28(4), for there is no evidence that a Committee of Investigation was ever appointed. Rather, it is more than evident that the present cases were considered and decided under reg. 28(3). And in cases under reg. 28(3), unlike under reg 28(4), there is no requirement to furnish the officer with the documentary evidence used against him (see *Yap Jack Keet v. Ketua Polis Negara & Anor* [2000] 7 CLJ 74, where it was held by Clement Skinner JC, as he then was, that only where General Order 26(5) of the 1980 General Orders (that would now be reg. 28(4) of the 1993 Regulations) comes into play would the officer have the right to examine witnesses and documents).

There was no failure in the procedure. What was required to be sent to the plaintiffs was a statement containing the facts of the breach of discipline alleged to have been committed by the plaintiffs. And that statement was given in the charge, in the respective show cause letters. What was further required to be sent to the plaintiffs was a statement containing the proposed ground on which the plaintiffs are to be dismissed or reduced in rank. And that statement was given in the same show cause letters which not only stated the proposed ground on which the plaintiffs are to be dismissed or reduced in rank but also reproduced the provisions of reg. 4(c), 4(d) or 4(g) of the 1993 Regulations. What was lastly required to be sent to the plaintiffs was a statement calling upon the plaintiffs to make written representation containing grounds upon which they rely to exculpate themselves. And that was also stated in the same show cause letters.

It was contended, that as the 1st show cause letter was withdrawn after representation, that therefore the charge in the 1st show cause letter had been rebutted. But to accept that contention would be to erase stubborn facts. The 2nd show cause letter was issued at about the same time that the 1st show cause letter was withdrawn. And reasonably, when given that the charges in the 1st and 2nd show cause letters were almost identical, the 2nd show cause letter could not have been issued if the disciplinary authority was satisfied that P1, P2 and P4 had exculpated themselves with regard to the charge in the

1st show cause letter. It is so very obvious, the withdrawal of the 1st show cause and the probably simultaneous issuance of the 2nd show cause letter was the device that was employed to amend the charge. And it should go without saying that there is the inherent power to amend a charge (for an illustration of the amendment of a charge in a disciplinary proceeding, see *Attorney General, Singapore v. Ling How Doong* [1969] 1 MLJ 154).

For those reasons, these four applications are therefore dismissed with costs.